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SIPDIS

DEPARTMENT FOR AF/E SUSAN DRIANO

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TAGS: [KDEM](#) [PGOV](#) [PHUM](#) [KE](#)  
SUBJECT: KENYA: CONTINUED CONTROVERSY REGARDING  
CONSTITUTIONAL RECOGNITION OF KADHI COURTS

NAIROBI 00001711 001.2 OF 002

¶1. (SBU) SUMMARY: As the Committee of Experts on the Constitution works to navigate contentious issues such as the system of government and administrative and/or financial devolution as they draft a proposed constitution, a recently formed Christian lobby has resurrected a long-running debate regarding the constitutional recognition of Muslim kadhi courts. Kadhi courts, established during the colonial period and recognized under the current constitution, are empowered to rule on family law matters when all parties adhere to the Muslim faith. Given their limited jurisdiction and GOK oversight, kadhi courts are not the entry point for Sharia law in Kenya as the Christian activists claim. END SUMMARY.

¶2. (SBU) The kadhi court system dates back to 1897, when the British colonial administration reached an agreement with the Sultanate of Zanzibar to recognize the rights of Muslim citizens living on the Swahili Coast to be ruled by Sharia law, administered by traditional courts overseen by a kadhi or Islamic judge. At independence, Kenya's constitution recognized kadhi courts as part of the judicial system. The current constitution states that kadhi courts are empowered to hear matters relating to "personal status, marriage, divorce, or inheritance" provided that all parties to the suit are Muslim. Decisions issued by Kadhi courts may be appealed to the Chief Kadhi, and then to the High Court of Kenya. Though kadhies are not required to hold traditional law degrees, they are selected and appointed by the national Judicial Service Commission and tend to represent moderate Sunni judicial traditions in keeping with Kenya's majority Sunni Muslim community.

¶3. (SBU) Currently there are 15 kadhi courts located throughout Kenya. Although the GOK pays kadhi judges' salaries and provides courtrooms, no support is provided for clerks or recordkeeping. According to Swahili Coast scholar David perling, as many as ninety percent of plaintiffs to the kadhi courts are women. As Kenyan civil law provides little recourse for women to claim child support from absentee fathers, Muslim women turn to the kadhi courts for judgments under stricter Sharia provisions requiring men to provide support to their children after divorces. As a result, Muslim men tend to regard kadhi rulings as biased toward women.

¶4. (SBU) Kenya's first attempt to revise the constitution, the 2004 Bomas Draft, retained the kadhi courts and proposed expanding their jurisdiction to include civil and commercial matters, while limiting the right to appeal kadhi rulings to secular courts. The Bomas Draft proposal was supported by the Mfungamano inter-faith coalition, which represented both mainstream Christian denominations and the Muslim community, but controversy arose when a number of Pentecostal churches argued that the expansion of kadhi jurisdiction would permit the introduction of more radical forms of Sharia law in Kenya. The 2005 Wako/Kilifi Draft Constitution, which was

defeated in a national referendum, sought to address these concerns by establishing Christian and Hindu civil courts.

¶5. (SBU) Debate regarding the constitutional provisions for kadhi courts was reignited when the newly-formed "Kenya Christian Constitutional Forum" issued a statement on July 21 opposing any provision for kadhi courts in the constitution currently being drafted by the Committee of Experts. The Forum claims that the kadhi system violates the separation of state and religion enshrined in the current constitution, and forces Christian citizens to support an Islamic institution. U.S. religious advocacy group International Christian Concern has also picked up the issue, stating that recognition of kadhi courts would result in the persecution of Christians in Muslim majority provinces "as it has in Sudan and Nigeria." In response, Muslim leaders have clarified that they are not seeking an expansion of kadhi jurisdiction, but insist that the courts be recognized in any new constitution.

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COMMENT  
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¶6. (SBU) As the Committee of Experts is still in the drafting stage, it is unclear what provisions will be made for kadhi courts. The posturing of religious activists ahead of the draft release reflects two concerns: the absence of information about the soon-to-be released draft, and ongoing tension between Christian and Muslim communities in Coast province.

¶7. (SBU) Kenyan politicians agree that eighty percent of the content in previously proposed constitutions are not controversial; rather, politicians are divided over several contentious issues (the overall system of government,

NAIROBI 00001711 002.2 OF 002

administrative and/or financial devolution from the central government to local districts, land reform, and the issue of kadhi courts). The Committee of Experts charged with proposing consensus solutions to these debates has engaged in a quiet drafting exercise without providing signals as to the positions they are taking, nor how they intend to resolve the long-standing and known contentious issues that have doomed prior attempts at constitutional reform. Technical experts assisting the commission have expressed concern that the Committee's failure to undertake political engagement as they draft could lead to the failure of current constitutional reform efforts as politicians and advocacy groups line up to criticize unpalatable elements of the draft once it is released. END COMMENT.  
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